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**IN THE SUPREME COURT
STATE OF ARIZONA**

In the Matter of:

**PETITION TO AMEND RULES 6,
7 AND 41 OF THE ARIZONA
RULES OF CRIMINAL
PROCEDURE**

Supreme Court No. R-16-0041

**DRAFT COMMENT OF
THE ARIZONA PROSECUTING
ATTORNEYS’ ADVISORY
COUNCIL**

I. BACKGROUND OF PETITION

In conjunction with the Supreme Court task force report “Justice for All, Report and Recommendations of the Task Force on Fair Justice for All: Court-Ordered Fines, Penalties, Fees, and Pretrial Release Policies” (“Report”), the Administrative Director of the Administrative Office of the Courts has proposed amendments to Rules 6, 7 and 41, *Arizona Rules of Criminal Procedure*. The amendments would revise existing language in the rules, add new provisions and definitions related to appointment of counsel, bail, bonds, and conditions of release, and modify existing forms related to bond and release.

1 The Arizona Prosecuting Attorneys' Advisory Council ("APAAC") has
2 considered the proposed changes and makes two initial observations. First, it notes
3 the task force report must be filed with the Arizona Judicial Council ("AJC") by
4 October 31, 2016. Report, p. 2. To date, the recommendations themselves have not
5 been considered, approved or adopted by the AJC. Therefore, the rule petition
6 appears premature. Second, the Supreme Court granted petitioner's request for an
7 expedited consideration of its petition outside the annual rule processing cycle.
8 Arizona Supreme Court No. R-16-0041, Order, August 29, 2016. Since the
9 recommendations in the Report have not yet been adopted, it is unknown why this
10 petition is being considered on an expedited basis. Considering the scope of the
11 changes in the proposed amendments, APAAC believes additional time should be
12 granted for circulating the proposed amendments among interested stakeholders for
13 comment.
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15 With these initial comments, APAAC will address specific portions of the
16 petition's proposed rule changes with recommended modifications.
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18 **II. DISCUSSION/ANALYSIS**

19 A. Amendments to Rules 6.1(b) and 7.4

20 The petition recommends an amendment to Rule 6.1(b) to add a right to
21 counsel if an indigent defendant is "detained pretrial after criminal charges are
22 filed." An appointment of counsel is made *mandatory* for pretrial detainees under
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petitioner's proposed rule change to Rule 7.4, adding a new subsection (e). APAAC notes that this proposal could have a tremendous financial impact on cities, towns and counties throughout Arizona. For example, in fiscal year 2015 alone, municipal courts in Arizona saw total filings of 311,717 criminal traffic and misdemeanor cases. Arizona Judicial Branch, 2015 Data Report, Municipal Courts, Narrative Summary.¹ Appointing counsel for every misdemeanor defendant who is detained pretrial could seriously burden those jurisdictions with unfunded costs.

At the same time, APAAC understands some jurisdictions now appoint counsel at the initial appearance, consistent with one of the recommendations of the task force (Report, p. 30). If the proposed rule is to be adopted, APAAC suggests modifying the addition in the proposed rule to create that right to counsel for a defendant detained pretrial *"after the suspect is booked into jail on criminal charges and probable cause has been established by the Initial Appearance judge who is prepared to set release conditions."* This would clarify that the intent of the rule is to appoint counsel in connection with release conditions earlier in the process, at the Initial Appearance, and not after charges are actually filed by a

¹ <http://www.azcourts.gov/statistics/Annual-Data-Reports/2015-Data-Report>

1 prosecuting agency through long form complaint or otherwise. As currently
2 written, the proposed rule could suggest a right to counsel exists only after a
3 prosecutor files charges.
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5 B. Amendments to Rule 7.1 and 7.6(d)(2)

6 The petition recommends amendments to Rule 7.1 which remove the
7 specification that a bond is meant to assure the defendant's "appearance" and add
8 new bond definitions for "cash bond" and "deposit bond." The Arizona
9 Constitution provides three purposes of bail and conditions of release, the first of
10 which is the defendant's appearance: 1) assuring the appearance of the accused; 2)
11 protecting against the intimidation of witnesses; and 3) protecting the safety of the
12 victim, any other person or the community. Ariz. Const. art. II, § 22.
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15 APAAC does not support the proposed change to Rule 7.1 and the
16 elimination of the reference to "appearance bond." First, APAAC expresses
17 concern regarding the likely confusion the proposed removal of the references to
18 the defendant's "appearance" will cause. Historically, the public understands that
19 a bond is to ensure a defendant's appearance in court. The current clear expression
20 of this expectation is accepted by the courts of Arizona, which have observed that
21 the "primary purpose of an appearance bond is to ensure that the defendant appears
22 at court proceedings." *State v. Int'l Fid. Ins. Co.*, 238 Ariz. 22 ¶ 8, 355 P.3d 624,
23 627 (App. 2015). Although it may be that courts are setting bonds too high or when
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1 they are not necessary, if a judge does determine that a bond is among the
2 conditions to be imposed on a defendant's release, then it is entirely appropriate to
3 make the primary purpose of the bond clear in the Rule, as it is clear now. APAAC
4 recommends not removing references to the essential nature of the bond, ensuring
5 the defendant's "appearance," from the Rules guiding courts in setting bonds.
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7 APAAC also requests clarification from petitioner as to what is meant to be
8 accomplished by a "deposit bond." As stated by petitioner, the intent of a "deposit
9 bond" is to allow a defendant to post only a percentage of the full amount of a cash
10 bond set. However, there is no provision for collection of the balance of that bond
11 in the event of a forfeiture; in particular, the entity responsible for collection, the
12 effects of bankruptcy before or after a forfeiture, or the limitations on supplemental
13 proceedings while a defendant has a pending criminal case. In the event a
14 defendant fails to appear, if the balance of the full amount of a cash bond set is
15 uncollectible, then having a bond category of "deposit bond" is a fiction. As it
16 exists, the language of the proposed definition of "deposit bond" is unclear.
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20 Finally, along this same line the addition of Rule 7.6(d)(2) also creates
21 confusion; it does not seem to allow for the circumstance when a court might have
22 reasons to partially forfeit and partially exonerate a bond. At a bond forfeiture
23 hearing, a court may order forfeiture of "all or part of the amount of the bond".
24 Rule 7.6(c)(2). Rule 7.6(d) as currently written can accommodate any of the other
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1 proposed changes and therefore it need not be amended.

2 C. Amendments to Rule 7.2(a)

3 The petition recommends several amendments to Rule 7.2(a). APAAC has
4 comment on two. First, the proposed amendment adds a new opening sentence on
5 the presumption of innocence. While the statement is a correct principle of law, it
6 seems gratuitous and unconnected to the substance of the rule which is release for
7 offenses bailable as a matter of right.
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10 Second, the petition recommends that in imposing conditions of release the
11 court should consider the protection of “other persons or the community from an
12 actual risk posed by the person.” APAAC commends the petitioner for recognizing
13 risk to victims and the community when setting release conditions. However, use
14 of the word “actual” in defining risk in the proposed amendment is ambiguous, and
15 APAAC recommends removal of that word. This would be consistent with A.R.S.
16 § 13-3967, which requires the court, when determining release, to take into account
17 “[e]vidence that the accused poses a danger to others in the community.” A.R.S. §
18 13-3967(B)(4). The statute requires no showing of an “actual” danger.
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21 The term “risk,” by definition, indicates there is not a certainty that harm will
22 be perpetrated, but that such harm is likely or possible. Whether a risk is highly
23 likely or merely possible can never be known with certainty. What is considered
24 serious risk by one person may only be considered a potential risk by another. For
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1 the latter, in setting release conditions would the court be constrained from
2 considering risk if it felt there was only a potential risk to a person or the
3 community? What level of showing would be required before a court found
4 “actual” risk? Would the parties have to litigate whether a risk was actual as
5 opposed to merely potential? Using the term “actual” to define “risk” in the
6 proposed criminal rule is unhelpful to the court and has an ambiguous meaning
7 when defining risk. APAAC recommends eliminating that word.
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10 D. Amendments to Rule 7.3(b)

11 The petition creates an entirely new Rule 7.3(b), eliminating the old
12 subsection (b). APAAC generally concurs with the principles behind the
13 amendment of Rule 7.3(b), but would reiterate that the change in the priority for
14 considering imposing an appearance bond does not require any changes in the
15 current appearance bond options. The new subsection 7.3(b) creates a new
16 category of discretionary conditions of release, and allows the court to impose both
17 non-monetary and monetary conditions. It also requires the court to consider the
18 results of an approved risk assessment, if any. APAAC again commends the
19 petitioner for requiring the consideration of a risk assessment tool, similar to what
20 is required in release decisions under A.R.S. § 13-3967(B)(5) (court shall take into
21 account the results of a risk or lethality assessment in a domestic violence charge).
22 While the non-monetary conditions impose a number of restrictions on a person,
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1 APAAC recommends adding to the list an *explicit* non-monetary condition that
2 prohibits the person from having contact with the victim of the crime.

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4 The petition contains another addition in Rule 7.3(b)(2) which provides that
5 when setting monetary conditions, the court must not impose a condition “that
6 results in unnecessary pretrial incarceration solely because the person is unable to
7 pay the bond.” This directive should not be a rule of criminal procedure. APAAC
8 understands that the Task Force Report is the genesis for this addition, but the
9 language itself is ambiguous. Must a court first impose the monetary condition and
10 then determine if it has an unnecessary result? How is the court to determine a
11 person’s inability to pay a bond at the time that monetary condition is set? What
12 makes pretrial incarceration “unnecessary”? It is not uncommon in a misdemeanor
13 trespass case that a bond of \$50 is set for a homeless or transient defendant because
14 that is the only means to assure their appearance in court. Does that result in
15 unnecessary pretrial incarceration because that defendant cannot pay the bond? If
16 there is no alternative means established by which to ensure the defendant’s
17 appearance, is a bond permissible for someone who is indigent and penniless? This
18 is unclear. It appears this procedural rule is being amended to address substantive
19 law.
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24 E. NEW Rule 7.7

25 The petition recommends a new rule of criminal procedure 7.7 which would

1 allow a Superior Court to unilaterally modify conditions of release set on lower
2 court jurisdiction misdemeanor cases. The intent of the new rule is to allow a felon
3 - who is on Superior Court probation but has a misdemeanor hold - to participate
4 in treatment.
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6 While the intent of the proposed rule is laudable, there are negative
7 consequences that have not been anticipated in the proposed rule. First, if the
8 misdemeanor hold is on a victim case, there is no provision for providing notice to
9 the victim or an opportunity to be heard before the Superior Court modifies the
10 release conditions. This could be a violation of existing law. Ariz. Const. art. II, §
11 2.1(4); Ariz. R. Crim. P. 7.4(b), 39(b)(6), (7); A.R.S. § 13-3967(G). Second, there
12 is no provision for communication between the Superior and lower jurisdiction
13 court (the proposal requires the Superior Court clerk only to provide a copy of its
14 order) or the affected prosecuting agencies. In most instances it is not the same
15 prosecuting office handling the felony and misdemeanor cases, and the prosecutor
16 would not know of modification of release conditions. Finally, there is no
17 provision for how the lower court jurisdiction would reacquire the defendant so
18 that disposition can occur on the misdemeanor case. Defendants must either be
19 able to sign for their court date or be given notice of their date. New rule 7.7 is
20 unworkable as proposed.
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1 F. Rule 41, Form 7

2 Finally, the proposed modifications to Rule 41, Form 7, could be better
3 drafted to implement the Petition's intended changes. The Petition presents the
4 twin needs of ensuring future court appearance and the public's safety. However,
5 proposed Form 7 only makes reference to the defendant's obligation to appear for
6 court, and not to any of the other conditions of release. Particularly if the new
7 categories and definitions of release and bonds are adopted, then Form 7 ought to
8 be clear regarding the greater obligation that the defendant or surety is undertaking
9 and that the bond is subject to forfeiture for a violation of those obligations beyond
10 appearance. On this point, the Petition fails to recognize the substantial increase in
11 risk this new requirement would place on those persons who post bond, particularly
12 the bail bond industry. It is unknown what effect this increased risk would have on
13 the bonding industry's willingness to post bonds.

14 Modified Form 7 as written also omits specification of any performance
15 requirement at all – even appearance – upon a Secured Bond without a surety and
16 a Secured Bond with a surety. The proposed language for a “Deposit Bond”
17 contemplates a portion of the bond being cash and a portion being unsecured, but
18 ambiguously provides that a defendant “will forfeit the cash bond.” Presumably
19 the unsecured portion of the bond is subject to forfeiture, but the “cash” reference
20 makes that unclear. Finally, the Petition states that Form 7 lists the bond types in

1 order of least restrictive to most restrictive but provides no explanation for that
2 order. Often a secured bond through a surety is easier for a defendant to post than
3 a cash bond. Bonds secured by a deposit of property are rare and often create delay
4 in release while the value of the property is determined. Should the proposed
5 changes to Rule 7.1 be adopted, APAAC urges that the proposed Form 7 be subject
6 to further review.
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8 **III. CONCLUSION**

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10 The Arizona Prosecuting Attorneys' Advisory Council understands the intent
11 of the petition in expediting the appointment of counsel for indigent defendants and
12 clarifying the use of conditions of release so that defendants are not detained pretrial
13 simply because they cannot post bail. These are admirable goals. However, the rule
14 changes contained in the petition as drafted are far-reaching and fundamentally alter
15 the current practice in Arizona. APAAC respectfully requests that the Arizona
16 Supreme Court allow for additional time for affected stakeholders to consider the
17 proposed rule changes requested in petition R-16-0041. In the alternative, APAAC
18 respectfully requests that the Arizona Supreme Court adopt the modifications
19 suggested in this comment.
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23 RESPECTFULLY SUBMITTED this ____ day of _____, 2016.
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25 _____
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Executive Director
Arizona Prosecuting Attorneys'
Advisory Council

Electronic copy filed with the
Clerk of the Arizona Supreme Court
this _____ day of _____, 2016.

by: _____